FINAL BILL ANALYSIS

BILL #: CS/CS/CS/CS/HB 479

FINAL HOUSE FLOOR ACTION:
94 Y's 21 N's

SPONSOR: Rep. Horner and Rep. Campbell

GOVERNOR'S ACTION: Approved

COMPANION BILLS: CS/SB 1590

SUMMARY ANALYSIS

CS/CS/CS/CS/HB 479 passed the House on May 2, 2011. The bill was amended by the Senate on May 3, 2011, and subsequently passed the House on May 4, 2011. The bill was approved by the Governor on June 27, 2011, chapter 2011-233, Laws of Florida and becomes effective October 1, 2011, and applies to causes of action accruing on or after that date.

This bill makes numerous changes relating to medical malpractice litigation in Florida.

This bill creates an "expert witness certificate" that an expert witness who is licensed in another jurisdiction must obtain before testifying in a medical negligence case or providing an affidavit in the presuit portion of a medical negligence case. This bill provides for discipline against the license of a physician, osteopathic physician or dentist that provides deceptive or fraudulent expert witness testimony related to the practice of medicine or the practice of dentistry.

This bill provides for the creation of an informed consent form related to cataract surgery. Such a form is admissible in evidence and its use creates a rebuttable presumption that the physician properly disclosed the risks of cataract surgery.

This bill provides that medical malpractice insurance contracts must contain a clause stating whether the physician or dentist has a right to "veto" any admission of liability or offer of judgment made within policy limits by the insurer. Current law prohibits such provisions in medical malpractice insurance contracts.

This bill provides that records, policies, or testimony of an insurer's reimbursement policies or reimbursement decisions relating to the care provided to the plaintiff are not admissible in any civil action and provides that a health care provider's failure to comply with, or breach of, any federal requirement is not admissible in any medical negligence case.

This bill provides additional immunity from civil liability for volunteer team physicians.

This bill has an insignificant fiscal impact associated with implementation of this bill.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

In 2003, the Legislature adopted ch. 2003-416, L.O.F., in response to dramatic increases in medical malpractice liability insurance premiums and the "functional unavailability" of malpractice insurance for some physicians.[1] The legislation, among other things, created a cap on noneconomic damages, created requirements for expert witness testimony, provided for additional presuit discovery, and required the Office of Insurance Regulation to report yearly on the medical malpractice insurance market in Florida. The reports[2] show the number of closed claims, the amount of damages paid, and the total gross medical malpractice insurance premium reported to the Office of Insurance Regulation since the enactment of ch. 2003-416, L.O.F.:

Claims, Damages and Insurance Premiums			
Year	Closed Claims	Total Damages	Total Premiums
2004	3,574	$664 million	$860 million
2005	3,753	$677 million	$850 million
2006	3,811	$602 million	$847 million
2007	3,553	$523 million	$663 million
2008	3,336	$519 million	$596 million
2009	3,087	$570 million	$550 million

The Office of Insurance Regulation report summarized the insurance rate filings in 2009:

> On average, rates for companies writing physicians and surgeons' malpractice insurance in the admitted market decreased 8.2%.[3]

The report noted, regarding the decrease in premium:

> This represents a dramatic decrease (36%) in the overall medical malpractice premium reported in Florida in 2009 from what was reported in 2004. This is attributable to the lowering of rates. However, it may also be due to new arrangements by physicians including the use of individual bonding, purchasing malpractice insurance through hospitals/employers as well as utilization of self-insurance funds, or other non-traditional insurance mechanisms.[4]

[1] Section 766.201(1), F.S.
[2] Information compiled from the Medical Malpractice Closed Claim Database and Rate Filing Annual Reports created by the Office of Insurance Regulation, 2005-2010. The closed claim and damages information are contained in the "Executive Summary" of each report. These reports can be accessed at http://www.floir.com/DataReports/datareports.aspx.
[3] Florida Office of Insurance Regulation, "2010 Annual Report – October 1, 2010 - Medical Malpractice Financial Information Closed Claim Database and Rate Filings" at page 4.
[4] *Id.* at 12.

The report summarized the growth of Florida's medical malpractice insurance market since 2004. In 2009, the Office of Insurance Regulation reported that 22 companies wrote 80% of the direct written premium in medical malpractice insurance and compared that number to prior years:

> This year, achieving the 80% market share requirement again required the inclusion of 22 insurers as in the previous year; 17 were required in the 2007 report, 15 insurers for the 2006 annual report, 12 in the 2005 annual report, and only 11 for the 2004 report.[5]

According to information provided by the Office of State Court Administrator, 1,248 medical malpractice cases were filed in Florida courts in 2010.

Issues Addressed by the Bill

Presuit Investigation, Presuit Notice, and Presuit Discovery

Background

Section 766.203(2), F.S., requires a claimant to investigate whether there are any reasonable grounds to believe whether any named defendant was negligent in the care and treatment of the claimant and whether such injury resulted in injury to the claimant prior to issuing a presuit notice. The claimant must corroborate reasonable grounds to initiate medical negligence litigation by submitting an affidavit from a medical expert.[6] After completion of presuit investigation, a claimant must send a presuit notice to each prospective defendant.[7] The presuit notice must include a list of all known health care providers seen by the claimant for the injuries complained of subsequent to the alleged act of negligence, all known health care providers during the 2-year period prior to the alleged act of negligence who treated or evaluated the claimant, and copies of all of the medical records relied upon by the expert in signing the affidavit.[8] However, the requirement of providing the list of known health care providers may not serve as grounds for imposing sanctions[9] for failure to provide presuit discovery.[10]

Once the presuit notice is provided, no suit may be filed for a period of 90 days. During the 90-day period, the statute of limitations is tolled and the prospective defendant must conduct an investigation to determine the liability of the defendant.[11] Once the presuit notice is received, the parties must make discoverable information available without formal discovery.[12] Informal discovery includes:

1. Unsworn statements - Any party may require other parties to appear for the taking of an unsworn statement.

2. Documents or things - Any party may request discovery of documents or things.

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[5] *Id.* at 11.
[6] Section 766.203(2), F.S.
[7] Section 766.106(2)(a), F.S.
[8] Section 766.106(2)(a), F.S.
[9] Sanctions can include the striking of pleadings, claims, or defenses, the exclusion of evidence, or, in extreme cases, dismissal of the case.
[10] Section 766.106(2)(a), F.S.
[11] Section 766.106(3), (4), F.S.
[12] Section 766.106(6)(a), F.S. The statute also provides that failure to make information available is grounds for dismissal of claims or defenses.

3. Physical and mental examinations - A prospective defendant may require an injured claimant to appear for examination by an appropriate health care provider. Unless otherwise impractical, a claimant is required to submit to only one examination on behalf of all potential defendants.

4. Written questions - Any party may request answers to written questions.

5. Medical information release - The claimant must execute a medical information release that allows a prospective defendant to take unsworn statements of the claimant's treating physicians. The claimant or claimant's legal representative has the right to attend the taking of such unsworn statements.[13]

Section 766.106(7), F.S., provides that a failure to cooperate during the presuit investigation may be grounds to strike claims made or defenses raised. Statements, discussions, documents, reports, or work product generated during the presuit process are not admissible in any civil action and participants in the presuit process are immune from civil liability arising from participation in the presuit process.[14]

At or before the end of the 90 days, the prospective defendant must respond by rejecting the claim, making a settlement offer, or making an offer to arbitrate in which liability is deemed admitted, at which point arbitration will be held only on the issue of damages.[15] Failure to respond constitutes a rejection of the claim.[16] If the defendant rejects the claim, the claimant can file a lawsuit.

Effect of the Bill

This bill makes changes to the presuit provision relating to unsworn statements. It removes the provision requiring a claimant to execute a medical release from s. 766.106, F.S., and creates a new release form provision.

This bill requires a claimant to execute an "authorization for release of protected health information" and include it with the presuit notice of intent to initiate litigation. The form is provided in the bill and authorizes the disclosure of protected health information that is potentially relevant to the claim of personal injury or wrongful death. The bill provides that the presuit notice is void if it is not accompanied by the executed authorization form. It further provides that the presuit notice is retroactively void from the date of issuance if the authorization is revoked and that "any tolling effect that the presuit notice may have had on any applicable statute-of-limitations period is retroactively rendered void."

Specifically, the form that claimants are required to execute provides that representatives of the potential defendant may obtain and disclose information from health care providers for facilitating the investigation and evaluation of the medical negligence claim described in the presuit notice or defending against any litigation arising out of the medical negligence claim made on the basis of the presuit notice.

[13] Section 766.106(6), F.S.
[14] Section 766.106(5), F.S.
[15] Section 766.106(3)(b), F.S.
[16] *Id.*

The form informs the claimant of the type of health information that may be obtained by defendants and defendant's counsel and from whom that information can be obtained. The form informs claimants of the extent of the authorization, that the authorization expires upon the resolution of the claim, that executing the authorization is not a condition of continued treatment, and that the claimant has the right to revoke the authorization at any time. The form has a section where claimants can list health providers to which the authorization does not apply. The claimant must certify that such health care information is not potentially relevant to the claim.

The language in the authorization form set forth in the bill appears to comply with federal requirements. In recent years, courts have been dealing with the effect of the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA") on state medical malpractice litigation. The HIPAA privacy rules prohibit the disclosure of protected health information except in specified circumstances.[17] With limited exceptions, HIPAA's privacy rules preempt any contrary requirement of state law unless the state law is more stringent than the federal rules.[18] HIPAA rules permit disclosure of health information in a number of circumstances.[19] Health care information may be disclosed if the patient has executed a valid written authorization.[20]

Expert Witness Qualifications

Background

Florida law requires expert witnesses in medical negligence cases to meet certain qualifications. The witness must be a licensed health care provider. If the health care provider against whom or on whose behalf the testimony[21] is offered is a specialist, the expert witness must specialize in the same or similarly specialty and have devoted professional time in clinical work related to that specialty during the previous 3 years.[22]

If the health care provider against whom or on whose behalf the testimony is offered is a general practitioner, the expert witness must have professional time during the 5 years immediately preceding the date of the occurrence that is the basis for the action and devoted professional time in practice or instruction of students as a general practitioner.[23]

Chapter 458, F.S., governs the regulation of medical practice. Chapter 459, F.S., governs the regulation of osteopathic medicine. Chapter 466, F.S., governs the regulation of dentists. Each chapter creates a board to deal with issues relating to licensing and discipline of physicians,

[17] 45 C.F.R. s. 164.502
[18] 45 C.F.R. s. 160.203
[19] Circumstances in which health information may be disclosed include in a judicial proceeding, protected information may be disclosed in response to a court order. It may also be disclosed without a court order in response to a subpoena or discovery request if the health care provider receives satisfactory assurances that the requestor has made reasonable efforts to ensure that the subject of the information has been given notice of the request. *See* 45 C.F.R. s. 164.512(3)(1)(i), 45 C.F.R. s. 164.512(e)(1)(ii)(A).
[20] 45 C.F.R. s. 164.508
[21] Section 766.102, F.S., provides qualifications for expert witnesses testifying at trial. Sections 766.202(6) and 766.203, F.S., provide qualifications for expert witnesses that must provide presuit corroboration of negligence claims. The qualifications for trial experts and presuit experts are the same.
[22] Section 766.102(5), F.S.
[23] Section 766.102(5), F.S.

osteopathic physicians and dentists. Under current law, an expert witness is not required to possess a Florida license to practice medicine, osteopathic medicine or dentistry.[24]

Effect of the Bill

The bill requires the Department of Health to issue an "expert witness certificate" to a physician or dentist licensed in another state or Canada to provide expert witness testimony in this state. The bill requires the Department to issue the certificate if the physician, osteopathic physician or dentist submits a completed application, pays an application fee of $50, and has not had a previous expert witness certificate revoked by the appropriate board. The application must contain the physician's or dentist's legal name; mailing address, telephone number, and business locations; the names of jurisdictions where the physician or dentist holds an active and valid license; and the license numbers issued to the physician or dentist by other jurisdictions.

The department must approve or deny the certificate within ten business days after receipt of the application and payment of the fee or the application is approved by default. A physician or dentist must notify the appropriate department of his or her intent to rely on a certificate approved by default. The certificate is valid for two years.

The certificate authorizes a physician, osteopathic physician or dentist to provide a verified expert opinion in the presuit stage of a medical malpractice case and to provide testimony about the standard of care in medical negligence litigation. The certificate does not authorize the physician, osteopathic physician or dentist to practice medicine or dentistry and does not require the certificate holder to obtain a license to practice medicine or dentistry.

This bill amends s. 766.102, F.S., relating to the qualifications of expert witness in cases against physicians licensed under ch. 458 or ch. 459, F.S, or dentists licensed under ch. 466, F.S. The bill requires that the expert witness testifying about the standard of care in such cases must be licensed under ch. 458, F.S., ch. 459, F.S., or ch. 466, F.S., or possess a valid expert witness certificate.

This bill also amends s. 766.102(5), F.S., to require that an expert witness conduct a complete review of the pertinent medical records before the witness can give expert testimony.

License Disciplinary Actions

Background

Chapter 458, F.S., regulates medical practice. Chapter 459, F.S., regulates the practice of osteopathic medicine. Chapter 466, F.S., regulates the practice of dentistry. Each chapter creates a board to deal with issues relating to discipline of physicians, osteopathic physicians and dentists. In general, the discipline process under ch. 458, F.S., ch. 459, F.S., and ch. 466, F.S., begins when a complaint is filed against a health care provider alleging a violation of the disciplinary statutes. The Department of Health reviews the case and a department prosecutor presents the case to the appropriate board or probable cause panel of the appropriate board. If probable cause is found, the Department of Health files an

[24] *See Baptist Medical Center of the Beaches, Inc. v. Rhodin*, 40 So.3d 112, 117 (Fla. 1st DCA 2010)(noting that Florida's expert witness statute "does not encompass a universe limited only to Florida licensees").

administrative complaint. If the health care provider disputes the allegations of the complaint, the provider can request a hearing before an administrative law judge. An attorney for the Department of Health prosecutes the case and the provider may be represented by counsel. The administrative law judge issues a recommended order upon the conclusion of the hearing. The recommended order and any exceptions filed by the parties are considered by the appropriate board and the board determines the appropriate discipline which can include a fine, suspension of the license, or revocation of the license.[25]

Sections 456.072, 458.331, 459.015 and 466.028, F.S., create grounds for which disciplinary action may be taken against a licensee.[26] It is not clear from those statutes whether the boards can impose discipline against a licensee for providing misleading, deceptive, or fraudulent expert witness testimony related to the practice of medicine, osteopathic medicine or dentistry. "Statutes providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee."[27] Section 458.331(1)(k), F.S., provides the following ground for discipline:

> Making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine.[28]

Section 466.028(1)(l), F.S., provides the following ground for discipline:

> Making deceptive, untrue, or fraudulent representations in or related to the practice of dentistry.

It is not clear whether a court would find deceptive or untrue expert testimony in a medical negligence case to be "related to the practice" of medicine, osteopathic medicine or dentistry.[29]

Current law allows discipline against a licensee for "being found by any court in this state to have provided corroborating written medical expert opinion attached to any statutorily required notice of claim or intent or to any statutorily required response rejecting a claim, without reasonable investigation."[30]

Effect of the Bill

The bill amends ss. 458.331, 459.015 and 466.028, F.S., to provide that the appropriate board may impose discipline on a physician or osteopathic physician who provides "deceptive or fraudulent expert witness testimony related to the practice of medicine" or on a dentist who provides "deceptive or fraudulent expert witness testimony related to the practice of dentistry." The disciplinary statutes allow the board to impose discipline against licensees who violate the statutes. The bill provides that an

[25] *See* ss. 456.072 and 456.073, F.S.
[26] Section 456.072(2), F.S., deals with discipline against licensees.
[27] *Elmariah v. Board of Medicine*, 574 So.2d 164, 165 (Fla. 1st DCA 1990).
[28] Section 459.015(1)(m), F.S., contains the same language related to osteopathic physicians.
[29] In *Elmariah*, 574 So.2d at 165, the court held that a deceptive application for staff privileges at a hospital was not made "in" the practice of medicine but noted that such an application might be "related" to the practice of medicine. The case demonstrates how a court will construe a statute very strictly in favor of the licensee.
[30] *See* ss. 458.331(1)(jj) and 459.015(1)(mm), F.S.

expert witness certificate shall be treated as a license in any disciplinary action and that the holder of an expert witness certificate is subject to discipline by the appropriate board.

The bill also amends ss. 458.331, 459.015 and 466.028, F.S., to provide that the purpose of the disciplinary sections is to "facilitate uniform discipline for those acts made punishable under this section and, to this end, a reference to this section constitutes a general reference under the doctrine of incorporation by reference."

Incorporation by Reference

Background

Current law allows for one section of statute to reference another, or "incorporation by reference." This is commonly done to prevent the repetition of a particular text. There are two kinds of references. A "specific reference" incorporates the language of the statute referenced and becomes a part of the new statute even if the referenced statute is later altered or repealed. The law presumes that the Legislature intends to incorporate the text of the current law as it existed when the reference was created. A law review article explained:

> From a very early time, it has been generally agreed that the legal effect of a specific statutory cross reference is to incorporate the language of the referenced statute into the adopting statute as though set out verbatim, and that in the absence of express legislative intent to the contrary, the Legislature intends that the incorporation by reference shall not be affected by a subsequent change to the referenced law – even its repeal. In other words, each referenced provision has two separate existences – as substantive provision and as an incorporation by reference – and neither is thereafter affected by anything that happens to the other.[31]

The second type of referenced statute is a "general reference." The general reference differs from the specific reference in that it presumes that the referenced section may be amended in the future, and any such changes are permitted to be incorporated into the meaning of the adopting statute. Again, Means explained in his article that "when the reference is not to a specific statute, but to the law in general as it applies to a specified subject, the reference takes the law as it exists at the time the law is applied. Thus, in cases of general references, the incorporation does include subsequent changes to the referenced law."[32]

Currently, other provisions of statutes provide statutory intent which allow for references to that statute to be construed as a general reference under the doctrine of incorporation by reference. For example, the statutes which deal with the punishments for criminal offenses contain clauses which allow for any reference to them to constitute a general reference.[33] This means that any time the Legislature amends a criminal offense, these punishment statutes do not have to be reenacted within the text of a bill because it is understood that their text or interpretation may change in the future.

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[31] Earnest Means, "Statutory Cross References - The "Loose Cannon" of Statutory Construction," Florida State University Law Review, Vol. 9, p. 3 (1981).
[32] *Id*.
[33] *See* ss. 775.082, 775.083, and 775.084, F.S.

Effect of the Bill

This bill contains a provision providing that the changes to the disciplinary statutes constitute a general reference under the doctrine of incorporation by reference. The incorporation by reference language in this bill could be interpreted to allow amendments to statutes which reference the disciplinary statute so that the reference takes the law as it exists at the time the law is applied.

Informed Consent

Background

The Mayo Clinic website describes cataract surgery as follows:

> Cataract surgery is a procedure to remove the lens of your eye and, in most cases, replace it with an artificial lens. Cataract surgery is used to treat a cataract — the clouding of the normally clear lens of your eye.[34]

Complications after cataract surgery are uncommon and risks include inflammation, infection, bleeding, swelling, retinal detachment, glaucoma, or a secondary cataract.[35]

The doctrine of informed consent requires a physician to advise his or her patient of the material risks of undergoing a medical procedure.[36] Physicians and osteopathic physicians are required to obtain informed consent of patients before performing procedures and are subject to discipline for failing to do so.[37] Florida has codified informed consent in the "Florida Medical Consent Law," s. 766.103, F.S. Section 766.103(3), F.S., provides:

> (3) No recovery shall be allowed in any court in this state against [specified health care providers including physicians and osteopathic physicians] in an action brought for treating, examining, or operating on a patient without his or her informed consent when:
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> (a)1. The action of the [health care provider] in obtaining the consent of the patient or another person authorized to give consent for the patient was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community as that of the person treating, examining, or operating on the patient for whom the consent is obtained; and
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> 2. A reasonable individual, from the information provided by the [health care provider], under the circumstances, would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures, which are recognized among

[34] http://www.mayoclinic.com/health/cataract-surgery/MY00164 (accessed February 19, 2011).
[35] http://www.mayoclinic.com/health/cataract-surgery/MY00164/DSECTION=risks (accessed February 19, 2011).
[36] *See State v. Presidential Women's Center*, 937 So.2d 114, 116 (Fla. 2006)("The doctrine of informed consent is well recognized, has a long history, and is grounded in the common law and based in the concepts of bodily integrity and patient autonomy").
[37] *See* ss. 458.331, F.S., and 459.015, F.S.

other [health care providers] in the same or similar community who perform similar treatments or procedures; or

(b) The patient would reasonably, under all the surrounding circumstances, have undergone such treatment or procedure had he or she been advised by the [health care provider] in accordance with the provisions of paragraph (a).

Section 766.103(4), F.S., provides:

(4)(a) **A consent which** is evidenced in writing and **meets the requirements of subsection (3) shall**, if validly signed by the patient or another authorized person, **raise a rebuttable presumption of a valid consent.**

(b) A valid signature is one which is given by a person who under all the surrounding circumstances is mentally and physically competent to give consent. (emphasis added).

The Florida Supreme Court discussed the effect of the rebuttable presumption in the Medical Consent Law in *Pub. Health Trust of Dade County v. Valcin.*[38] In that case, the patient signed two consent forms, one acknowledging that no guarantees had been made concerning the results of the operation and one stating that the surgery had been explained to her.[39] The patient argued that the doctor made oral representations that contradicted the consent forms and made other statements that were not addressed by the consent forms. The court found that such claims could overcome the presumption:

> [W]e note that no conclusive presumption of valid consent, rebuttable only upon a showing of fraud, will apply to the case. The alleged oral warranties, of course, if accepted by the jury may properly rebut a finding of valid informed consent.[40]

A second issue in Valcin was not related to informed consent but was which type of presumption should apply when surgical records related to the surgery at issue were lost. The *Valcin* court discussed the two types of presumptions created under the Evidence Code:

> At this point, we should clarify the type of rebuttable presumption necessitated under this decision. The instant problem should be resolved either by applying a shift in the burden of producing evidence, section 90.302(1), Florida Statutes (1985), or a shift in the burden of proof. § 90.302(2), Fla.Stat. (1985). While the distinction sounds merely technical, it is not. In the former, as applied to this case, the hospital would bear the initial burden of going forward with the evidence establishing its nonnegligence. If it met this burden by the greater weight of the evidence, the presumption would vanish, requiring resolution of the issues as in a typical case. *See Gulle v. Boggs,* 174 So.2d 26 (Fla.1965); C. Ehrhardt, *Florida Evidence* § 302.1 (2d ed. 1984). The jury is never told of the presumption.
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> In contrast, once the burden of proof is shifted under section 90.302(2), the presumption remains in effect even after the party to whom it has been shifted introduces evidence

[38] 507 So.2d 596 (Fla. 1987).
[39] *See Pub. Health Trust of Dade County v. Valcin,* 507 So.2d 596, 598 (Fla. 1987).
[40] *Id.* at 599.

> tending to disprove the presumed fact, and "the jury must decide whether the evidence introduced is sufficient to meet the burden of proving that the presumed fact did not exist." Ehrhardt at § 302.2, citing *Caldwell v. Division of Retirement,* 372 So. 2d 438 (Fla. 1979).[41]

The *Valcin* court discussed the second kind of rebuttable presumption:

> The second type of rebuttable presumption, as recognized in s. 90.302(2), F.S., affects the burden of proof, shifting the burden to the party against whom the presumption operates to prove the nonexistence of the fact presumed. "When evidence rebutting such a presumption is introduced, the presumption does not automatically disappear. It is not overcome until the trier of fact believes that the presumed fact has been overcome by whatever degree of persuasion is required by the substantive law of the case." Rebuttable presumptions which shift the burden of proof are "expressions of social policy," rather than mere procedural devices employed "to facilitate the determination of the particular action."
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> A section 90.302(2) presumption shifts the burden of proof, ensuring that the issue of negligence goes to the jury.[42] (internal citations omitted).

Effect of the Bill

The bill requires the Boards of Medicine and Osteopathic Medicine to adopt rules establishing a standard informed consent form setting forth recognized specific risks relating to cataract surgery. The boards must consider information from physicians and osteopathic physicians regarding specific recognized risks of cataract surgery and must consider informed consent forms used in other states. The rule must be proposed within 90 days of the effective date of the bill.

The bill provides that in a civil action or administrative proceeding against a physician or osteopathic physician based on the failure to properly disclose the risks of cataract surgery, a properly executed informed consent form is admissible and creates a rebuttable presumption that the physician or osteopathic physician properly disclosed the risks.

Reports of Adverse Incidents

Current Law

Sections 458.351 and 459.026, F.S., require health care providers practicing in an office setting to report "adverse incidents" to the Department of Health and requires the Department of Health to review such incidents to determine whether disciplinary action is appropriate. Hospitals and other facilities licensed under s. 395.0197, F.S., also have adverse incident reporting requirements. In general,

[41] *Id.* at 600.
[42] *Id.* at 600-01.

adverse incidents are incidents resulting in death, brain or spinal damage, wrong site surgical procedures, or cases of performing the wrong surgical procedure.[43]

Effect of the Bill

The bill provides that incidents resulting from recognized specific risks described in the signed consent forms (discussed elsewhere in this analysis) related to cataract surgery are not considered adverse incidents for purposes of ss. 458.351, 459.026, and 395.0197, F.S.

"Consent to Settle" Clauses in Medical Malpractice Insurance Contracts

Background

Section 627.4147, F.S., contains provisions relating to medical malpractice insurance contracts. Among other things, medical malpractice insurance contracts must include a clause requiring the insured to cooperate fully in the presuit review process if a notice of intent to file a claim for medical malpractice is made against the insured.

In addition, the insurance contract must include a clause authorizing the insurer or self-insurer to "determine, to make, and to conclude, without the permission of the insured, any offer of admission of liability and for arbitration pursuant to s. 766.106, settlement offer, or offer of judgment, if the offer is within the policy limits."[44] The statute further provides that it is against public policy for any insurance policy to contain a clause giving the insured the exclusive right to veto any offer for admission of liability and for arbitration, settlement offer, or offer of judgment, when such offer is within the policy limits. However, the statute provides that the insurer must act in good faith and in the best interests of the insured.[45]

The provision giving insurers the exclusive right to settle claims within policy limits was enacted in 1985.[46] Subsequent to that legislation, there have been cases where physicians argued that insurance companies improperly settled claims.[47] In *Rogers v. Chicago Insurance Company*,[48] a physician sued his malpractice carrier for failing to exercise good faith in settling a claim. He argued that the claim was completely defensible and he was damaged by the settlement because of, among other things, his inability to obtain medical malpractice insurance.[49] The court held that the statute did not create a cause of action for the physician and explained:

> Rogers's interpretation of the statute would make its primary purpose, which is not to allow insured's to veto malpractice settlements, meaningless. We say that because, if an insurer did settle with the claimant over the objection of the insured, the insurer would then be exposed to unlimited damages for increased insurance premiums, inability to get

[43] *See generally* s. 458.351, F.S., for examples of incidents required to be reported. Sections 459.026 and 395.0197, F.S., contain reporting requirements for osteopathic physicians and hospitals.
[44] Section 627.4147(1)(b)1., F.S.
[45] *Id.*
[46] *See Shuster v. South Broward Hosp. Dist. Physicians' Professional Liability Ins. Trust*, 591 So.2d 174, 176 n. 1 (Fla. 1992).
[47] In addition to the case discussed in this analysis, see *Freeman v. Cohen*, 969 So.2d 1150 (Fla. 4th DCA 2008).
[48] 964 So.2d 280 (Fla. 4th DCA 2007).
[49] *Id. at 281.*

> insurance, or other far removed and unknown collateral damages. No insurer would take that risk and the objecting insured would thus have the veto which the statute purports to eliminate.
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> We conclude that the statutory language, requiring that any settlement be in the best interests of the insured, means the interests of the insured's rights under the policy, not some collateral effect unconnected with the claim. For example, the insured may have a counterclaim in the malpractice lawsuit for services rendered, which should not be ignored. Nor should the insurer be able to settle with the claimant and leave the doctor exposed to a personal judgment for contribution by another defendant in the same case. By including the language that any settlement must be in the best interest of the insured, the legislature was merely making it clear that, although it was providing that an insured cannot veto a settlement, the power to settle is not absolute and must still be in the best interests of the insured[.][50]

In dissent, Judge Warner argued that the majority effectively writes the "good faith" provision out of the statute:

> The majority suggests that Rogers's interpretation would render meaningless part of the statute in that an insured could veto malpractice settlements by objecting. I do not agree. If the insurer has fulfilled its obligation of good faith in investigating and evaluating the case, and it has considered the best interests of the insured, then it can settle the case. The insured cannot veto the settlement...
>
> The statutory obligation of good faith and best interest provides the only protection to a doctor against insurance companies who may settle unfounded cases simply because it is cheaper to settle than to defend. That is a decision in the insurer's own interests, which it could do under *Shuster* but is not consistent, in my view, with its duties under section 627.4147. The majority opinion takes this statutory protection away from the physician. I would read the statute as written and allow Dr. Rogers's cause of action to proceed[.][51]

<u>Effect of the Bill</u>

This bill allows medical malpractice insurance policies to contain provisions allowing physicians to "veto" settlement offers made to the insurance company that are within policy limits. Instead of not allowing such provisions, the bill would require that policies "clearly" state whether the physician has the exclusive right to veto settlements.

[50] *Id.* at 284.
[51] *Id.* at 285-86 (Warner, J., dissenting).

Exclusion of Evidence

Background

Section 90.402, F.S., provides that all relevant evidence is admissible, except as a provided by law. Section 90.401, F.S, defines "relevant evidence" as evidence tending to prove or disprove a material fact. The trial court judge determines whether evidence is admissible at trial and a decision on the admissibility is reviewable for an abuse of discretion.

Currently, information about whether an insurer reimbursed a physician for performing a particular procedure or test is subject to admission as evidence during a trial based on whether it is relevant. The trial judge makes an individual determination as to whether such evidence is admissible.

Effect of the Bill

The bill amends s. 766.102, F.S., to provide that records, policies, or testimony of an insurer's[52] reimbursement policies[53] or reimbursement determination regarding the care provided to the plaintiff are not admissible as evidence in medical negligence actions.

The bill amends s. 766.102, F.S., to provide that a health care provider's failure to comply with, or breach of, any federal requirement is not admissible as evidence in any medical negligence case. Evidence of a health care provider's compliance with federal requirements could be admissible if the trial judge found it to be relevant.

Volunteer Physicians

Background

Section 768.135, F.S., provides limited immunity from civil liability for "volunteer team physicians." The statute provides:

> Any person licensed to practice medicine pursuant to chapter 458, chapter 459, chapter 460, chapter 461, or chapter 466:
>
> (1) Who is acting in the capacity of a volunteer team physician in attendance at an athletic event sponsored by a public or private elementary or secondary school; and
>
> (2) Who gratuitously and in good faith prior to the athletic event agrees to render emergency care or treatment to any participant in such event in connection with an emergency arising during or as the result of such event, without objection of such participant,

[52] The bill defines "insurer" as "any public or private insurer, including the Centers for Medicare and Medicaid Services."
[53] The bill defines "reimbursement policies" as "an insurer's policies and procedures governing its decisions regarding health 366 insurance coverage and method of payment and the data upon which 367 such policies and procedures are based, including, but not 368 limited to, data from national research groups and other patient 369 safety data as defined in s. 766.1016."

> shall not be held liable for any civil damages as a result of such care or treatment or as a result of any act or failure to act in providing or arranging further medical treatment when such care or treatment was rendered as a reasonably prudent person similarly licensed to practice medicine would have acted under the same or similar circumstances.

In *Weiss v. Pratt*,[54] the court questioned whether the statute provided any protections for volunteer physicians:

> If section 768.135 provides immunity for a volunteer physician, how does its protection differ from basic tort law? Before a physician can be held liable for medical negligence, the plaintiff must prove that the physician fell below the standard of care of a reasonable physician under similar circumstances. *See* Fla. Std. Jury Instr. (Civ.) 402.4a. Section 768.135 appears to provide no more protection (save the "similarly licensed" requirement) than general tort law. The statute purports to provide immunity, but its protection is illusory. If the legislature intended to provide some additional layer of protection to those physicians who volunteer their services, then perhaps the statute needs another look.[55]

Section 1006.20, F.S., requires a medical examinations before children can participate in certain school sport activities.

Effect of this Bill

This bill limits the liability of volunteer team physicians and health care providers who volunteer to provide evaluations pursuant to s. 1006.20(2)(c), F.S., to situations where treatment was rendered in a "wrongful manner." This bill defines "wrongful manner" as "bad faith or with malicious purpose or in a manner exhibiting wanton and willful disregard of human rights, safety, or property."

Risk Management Programs

Background

Section 766.110, Florida Statutes, imposes a duty on all health care facilities to assure comprehensive risk management and the competence of their medical staff and personnel through careful selection and review. A health care facility is required to adopt a comprehensive risk management program. A health care facility is liable for failing to exercise due care in fulfilling that duty when the failure proximate cause of injury to a patient.

Effect of this Bill

This bill allows a health care facility to use scientific diagnostic disease methodologies that use information regarding specific diseases in health care facilities as part of the risk management program if the methodologies are adopted by the health care facilities medical review committee.

[54] 53 So.3d 395 (Fla. 4th DCA 2011).
[55] *Id. at 401.*

Effective Date

This bill provides an effective date of October 1, 2011, and applies to causes of action arising on or after that date.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill requires physicians and dentists licensed in another state or Canada to pay a fee of $50 to obtain an expert witness certificate in order to provide an expert witness opinion or provide expert testimony relating to the standard of care in a medical malpractice case involving a physician or dentist. The department estimates that during the first year there will be approximately 2,478 expert witness certificates applied for, thereby resulting in revenues of $123,900 to be deposited within the Medical Quality Assurance Trust Fund.

2. Expenditures:

The Department of Health will require additional budget authority in contracted services for application processing and one OPS position to implement the provisions of the bill. The estimated cost will be less than $58,000 and will be absorbed within existing department resources.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill requires physicians and dentists licensed in another state or Canada to pay a fee of $50 to obtain an expert witness certificate in order to provide an expert witness opinion or provide expert testimony relating to the standard of care in a medical malpractice case involving a physician or dentist.

D. FISCAL COMMENTS:

The fiscal impact on private parties is speculative.